

Counsel appearing on following page

DISTRICT COURT OF GUAM
TERRITORY OF GUAM

FILED
DISTRICT COURT OF GUAM

JUN 22 2007

MARY L.M. MORAN
CLERK OF COURT

JULIE BABAUTA SANTOS, *et al*

Petitioners,

v.

FELIX P. CAMACHO, *et al*.

Respondents

Civil Case No. 04-0006

CHARMAINE R. TORRES, *et al*.

Plaintiffs

v.

GOVERNMENT OF GUAM, *et al*.

Respondents

Civil Case No. 04-000³⁸~~18~~ *af*

MARY GRACE SIMPAO, *et al*,

Plaintiffs,

v.

GOVERNMENT OF GUAM

Defendant.

v.

FELIX P. CAMACHO, Governor of Guam

Intervenor-Defendant

Civil Case No. 04-00049

**OPPOSITION OF JANICE CRUZ
AND MARY GRACE SIMPAO TO
JOINT MOTION FOR FINAL
CERTIFICATION OF EIC CLASS
FOR SETTLEMENT PURPOSES**

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INTRODUCTION

Class members Janice Cruz and Mary Grace Simpao, Plaintiffs in *Simpao et al v. Government of Guam*, Civil case No. 04-00049 (hereinafter referred to as *Simpao*), hereby submit their opposition to a *Joint Motion of the Petitioners in Santos and Torres for Final Certification of the EIC Class For Settlement Purposes* filed June 8th, 2007.

Class Members Simpao and Cruz oppose certification of the class for settlement since, as structured, there exists antagonism between two subsets of the class and lead plaintiff in the matter does not adequately represent the class as a whole.

FACTS RELEVANT TO THE OBJECTION

Phillips filed the *Santos* action February 12, 2004. That action sought recovery of EITCs only for tax years 1998–2003, and did not cover EITC claims for 1995–1997, 2004 and future tax years, nor did it allege exhaustion of administrative remedies. *See Santos v. Camacho, CV 04-00006 at Docket No. 1.*¹

Four months after he filed the petition, with no discernable discovery, and while the Governor was off-island, Phillips negotiated a settlement with the Lieutenant Governor that committed the Government of Guam to pay out \$60 million and awarded Phillips \$6 million in attorneys' fees.² Phillips had recently represented the Lieutenant Governor in a struggle with Governor Felix Camacho over the powers of the Office of Lieutenant Governor. *See In re Request of Governor Felix P. Camacho, 2004 Guam 10 (Guam 2004).* Furthermore, at the same

¹ On December 3, 2004, Plaintiffs Mary Grace Simpao and Christina Naputi filed a separate complaint. *See Simpao v. Guam, Docket No. 1.* Simpao's complaint also sought recovery for tax years 1995, 1996, and 1997, and pled and established jurisdiction, standing, and interest in each class year. Additionally Simpao sought relief for each year, a mechanism for making claims, adequate individual notice, payment of EIC refunds for each year, and enforcement of the EIC program in future years.

² *Id at Docket No. 14*, Order Granting Prelim. Approval of Class Action Settlement entered June 17, 2005 with Settlement Agreement attached (hereinafter, *Santos I*).

1 time he was negotiating the *Santos* settlement, Phillips was the lone bidder for a legal services
2 contract to become the Lt. Governor's permanent legal counsel. *See Decl. of Thomas J. Fisher*
3 *at exhibit A.*

4 Phillips, the Lieutenant Governor and the Attorney General announced *Santos I* in the
5 press on Sunday, June 13, 2004. *See Fisher Decl. at exhibit B.* The next day on June 14, 2004,
6 they submitted a Stipulated Order of Preliminary Approval to the federal court. The settlement
7 agreement attached to the Stipulated Order contained a provision that Phillips be awarded 10%
8 of the recovery as attorneys' fees (\$6 million dollars).
9

10
11 On June 17, 2004, the Court conducted what Phillips refers to as a "settlement
12 conference" with Phillips, the Lieutenant Governor and the Attorney General. At the conclusion
13 of the meeting, the magistrate signed a Stipulated Order Granting Preliminary Approval of Class
14 Action Settlement. Phillips' fee in the attached settlement agreement, however, was now crossed
15 out and replaced with a provision that the Court would determine attorneys' fees. *Santos v.*
16 *Camacho at Docket No. 14.*
17

18
19 The next day, Phillips submitted a separate stipulation signed by the Attorney General
20 awarding himself \$6 million dollars in attorney's fees. *Santos v. Camacho at Docket No. 16.*
21 That Order was signed by Magistrate Manibusan and entered in the *Santos* action on June 24,
22 2004. *Id.* At this time, no class had been certified and Phillips had never moved for or been
23 appointed lead counsel. No motion for attorneys' fees compliant with Federal Rules of Civil
24 Procedure (FRCP) Rule 23(h)(1) or 54(d)(2) had ever been filed.
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26
27 *Santos I* provided for notice to the class solely through publication (one notice per week
28 for three weeks) even though the parties fully acknowledged the Respondent had mailing
29 addresses on file for the putative class claimants. *Santos I* at p. 17, ¶ V.2. The notice Phillips
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1 allowed to be published was inaccurate in several respects; it told class members they would
2 recover approximately 50% of their claim when, for some years, *Santos I* provided for less than
3 20% recovery. *See Fisher Decl. at exhibit C*. It also incorrectly stated the class had already been
4 certified. *Id.* Additionally, although he held himself out as class counsel, Phillips provided no
5 contact information for himself and directed class members' inquiries to the Respondent. *See Id.*

7 On July 14, 2004, after two motions to intervene had highlighted Phillips' numerous
8 errors, Phillips filed a belated motion to be appointed class counsel and re-requested his already
9 court-approved award of attorney fees. *Memorandum Of Points And Authorities In Support For*
10 *Petitioner's Motion For An Order Appointing Class Counsel, CV04-00006, Docket No. 45*. In
11 his words, he did so because "a number of attorneys are seeking to intervene and share in any
12 recovery" and he wanted "to ensure a clear record in this matter." *Id. at p. 4*. In his motion,
13 Philips acknowledged the parties had failed to accomplish even the minimal notice they had
14 promised and now realized individual notice "would be best for all parties involved." *Id. at p.*
15 *24; see Stipulation of the Parties Regarding Additional Notices to the Class, CV04-00006,*
16 *Docket No. 40*. In addition, he acknowledged it necessary to "clarify" the information in the first
17 *Santos* notice (i.e., that the class had been certified and that the Court had already approved the
18 attorneys' fee award) in order to now comply with the Federal Rules of Civil Procedure. *Id. at p.*
19 *24*. The revised notice still contained a statement that the Court had "preliminarily" approved a
20 10% attorney fee and lists Phillips as "counsel" for the class. *See CV04-00006, Docket No. 45 at*
21 *Exhibit A*. The revised notice did not inform class members they could enter an appearance in
22 the action through counsel, nor did it inform the class there were two motions for intervention
23 pending which cited deficiencies in the settlement. *Id.* The Court signed an order appointing
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1 Phillips interim class counsel on July 16, 2004. *CV04-00006, Docket No. 54*. The Court took no
2 action on Phillips' second motion for attorneys' fees.

3 By this time, two competing class actions had been filed; the *Simpao*³ and *Torres* actions
4 now consolidated here); and the Governor was now expressing his reservations with the
5 settlement. The Governor sought to investigate the circumstances under which *Santos I* had been
6 reached. He was told by the Attorney General, "there is no written documentation regarding the
7 history of the negotiations leading up to the Settlement Agreement." See *Amended*
8
9 *Memorandum Of Points And Authorities In Support Of Opposition To Petitioner's Motion For*
10 *The Approval Of The Administrative Plan, CV04-00006, Docket No. 102, at p. 4 (hereinafter,*
11 *"Gov's Opp. To Settlement")*.
12

13
14 In an attempt to cure defects in the settlement, Phillips filed a motion for approval of a
15 purported "Administrative Plan" that was, in reality, a revised settlement agreement. See *Fisher*
16 *Decl. at exhibit E. Correspondence between the Office of the Governor and the Attorney*
17 *General's Office referring to the Administrative Plan as "a new settlement under the guise of an*
18 *administrative plan."* The Governor then appeared in the *Santos* action with his own counsel to
19 oppose the settlement. See *Gov's Opp. To Settlement*.
20

21 Phillips negotiated with the government again, this time with the Governor. As a result,
22 Phillips and the Governor came to the Court on June 20, 2005, with a new class action petition
23 and a second settlement agreement (hereinafter referred to as "*Santos II*"), but not before the
24 unincluded *Simpao* Plaintiffs defeated a motion to dismiss for lack of jurisdiction and failure to
25 state a claim on March 17, 2005.⁴ The amended *Santos* petition now alleged exhaustion of
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30 ³ See exhibit D of *Fisher Decl.*

⁴ See exhibit F of *Fisher Decl.*

1 administrative remedies but did not explain how Plaintiffs had done so. This new petition and
2 settlement included tax year 1995, but recoveries for tax years 1996, 1998, 1999, and 2000
3 *actually decreased* compared to *Santos I*. Tax year 1997 was still not included.⁵ *Id.*

4
5 The new settlement changed few, if any, of the defects previously noted by the Governor
6 and Plaintiffs and added new ones. This time, the parties filed a joint motion for preliminary
7 approval, not a stipulated order and, as required by the *Santos II* agreement, Phillips filed a
8 motion for conditional certification of a settlement class. *CV04-00006, Docket Nos. 211 & 212.*

9
10 There was no indication that Phillips had attempted to discover or estimate the actual
11 damage suffered by the class, and to the very present Phillips has neglected to so investigate.
12 *See, e.g., Amended Declaration of Interim Class Counsel Michael F. Phillips in Support of*
13 *Amended Motion for Appointment of Lead Class Counsel (Amending Docket No. 276), CV04-*
14 *00006, Docket No. 349, passim.* The Attorney General refused to sign the settlement.

15
16 In the meantime, Simpao continued to litigate her case and, on June 15, 2005, the Court
17 granted Simpao partial summary judgment.⁶ The Court ruled the EITC applies to Guam and that
18 Plaintiffs had exhausted administrative remedies by filing tax returns. The court then directed
19 Simpao to file a motion to certify the class. Simpao filed a motion for class certification on July
20 5, 2005. *CV04-00049, Docket No. 107.*

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22 At this point, the EITC litigation disintegrated into a procedural battle centered on the
23 struggle between the Attorney General and the Governor for control of the action and the various
24 procedural postures of the three pending class actions.
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29 ⁵ Other defects associated with *Santos II* are presented in Simpao's Objections to Final Approval of *Santos-Torres*.
30 *III*. As noted in that pleading, there is not much difference between *Santos II* and *III*. See *Supplemental Filing In*
Opposition To Preliminary Approval Of Class Action Settlement, CV06-00004, Docket No. 345.

⁶ See *Fisher Decl exhibit G.*

1 Ultimately, the Court ordered the cases consolidated and stayed them all until such time
2 as it could rule on the dispute between the Attorney General and the Governor. *See CV04-*
3 *00006, Santos v. Camacho, Docket No. 299.* Despite the stay, however, the Court did direct the
4 petitioners to file motions for appointment of lead counsel. *Santos v. Camacho, Docket No. 300.*
5 In response, the Governor requested and was granted time to conduct a global settlement
6 conference. Phillips again failed to work cooperatively with the Simpao Plaintiff's counsel.
7

8 Phillips, with petitioner Torres' counsel and the Governor, have now filed a new
9 settlement (hereinafter referred to as "*Santos-Torres*") substantively no different from *Santos II*
10 with the exception that class year 1997 is now included and Phillips has split part of the proposed
11 fee award with counsel for Torres. *See CV04-00006, Santos v. Camacho, Docket No. 324, at*
12 *Exhibit I.* On August 25th, 2006 Simpao opposed Santos Counsel's earlier motion to be
13 appointed lead counsel. In that opposition, Simpao cited many of the deficiencies noted herein
14 and more. *See Fisher Decl. at exhibit H.*
15

16 On January 9th, 2007 this Court granted preliminary approval to *Santos-Torres* and
17 ordered notice be made to the class members. The provided notice was not in accordance with
18 Federal Rule of Civil Procedure 23, nor does it comport with the Federal Judicial Center's model
19 for instructions as to class notice, and was not designed to actually reach class members. *See*
20 *Fisher Decl. at exhibit I.*
21

22 On March 8th, 2007 Respondent and class representative realized that as to a significant
23 number of class members a mistake had been made in notice and moved the Court to allow
24 revised notice. This Court allowed them to do so on March 12th, 2007. Inexplicably, and
25 contrary to law, Santos counsel again allowed defective notice to issue, and did not include the
26 required "non-debtor spouse" provisions of 26 CFR 301.6402-6(i)(1). This was the second
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1 round of defective notice issued by Santos counsel. *Santos-Torres* waives all interest for all
2 years, places all class years in an artificial queue and groups class years 1995, 1996, 1999, and
3 2000 together to share one \$15 million dollar award.

4 **MEMORANDUM OF POINTS AND AUTHORITY**

5
6 Federal Rules of Civil Procedure allow for certification of a class where;

7 . . . (1) the class is so numerous that joinder of all members is impracticable, (2) there are
8 questions of law or fact common to the class, (3) the claims or defenses of the
9 representative parties are typical of the claims or defenses of the class, and (4) the
10 representative parties will fairly and adequately protect the interests of the class.
11 *Fed. R. Civ. P. 23(a)*.

12 *Santos* and *Torres* have asked this court to certify the class pursuant to Fed. R.Civ. P.

13 23(b)(3). *See Joint Motion of the Petitioners pp. 11-12*. This rule provides that;
14

15 An action may be maintained as a class action if the prerequisites of subdivision (a) are
16 satisfied, and in addition: . . . the court finds that the questions of law or fact common to
17 the members of the class predominate over any questions affecting only individual
18 members, and that a class action is superior to other available methods for the fair and
19 efficient adjudication of the controversy. The matters pertinent to the findings include:
20 (A) the interest of members of the class in individually controlling the prosecution or
21 defense of separate actions; (B) the extent and nature of any litigation concerning the
22 controversy already commenced by or against members of the class; (C) the desirability
23 or undesirability of concentrating the litigation of the claims in the particular forum; (D)
24 the difficulties likely to be encountered in the management of a class action.

25 In this matter, under the proposed settlement, this Court should not grant certification to
26 the class for two reasons 1) as the settlement is structured, class antagonism exists such that the
27 “class predominance” inquiry of Rule 23 (b)(3) is not met and 2) class representative does not
28 fairly and adequately represent the interests of the class.
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2 I. Class Antagonism
3

4 The architecture of the settlement is inherently unsound. Four features, working in concert,
5 produce an antagonism among the years and create competition for placement in the refund
6 queue.;
7

8
9 1. Pursuant to law, unpaid tax refunds accumulate interest at the Federal short
10 term interest rate plus 3%. *See 26 U.S.C. §6621*. The settlement however abandons all
11 interest for all class years⁷. This waiver, because of the passage of time and the
12 compounding of interest, hurts earlier years more than later. This is particularly true in
13 light of the settlement's reservation to Respondent of off-sets under 26 USC §6402.
14

15 2. Class year 1997 is first paid, then 1998, then 1995, 1996, 1999 and 2000
16 together, followed by 2001, 2002, 2003 and finally 2004. This structure is in place
17 despite the fact that the Respondent has already received in excess of 20,000 claims from
18 the entire spectrum of years.
19

20 3. A condition precedent to any distribution to any class year is the accumulation
21 of funds for that year.
22

23 4. The settlement contains no provision to guarantee payment for all years.
24 Payment amounts are predicated on the continued existence of the Reserve Fund.
25

26 Under the structure, class years must queue for payment and wait for each precedent year
27 to be satisfied. *See Settlement p. 25, ¶ e*. Naturally, because a class year suffers additional
28 damage as each day elapses (they get no interest while waiting in line), each year would prefer to
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 ⁷ Tax year 1997 will receive interest. Presumably the Respondent concedes liability for this year.

1 be at the head of the line. Additionally, each year would prefer to displace 1998 from its
2 preferred position and share in the initial immediate distribution of \$10 million dollars. This is
3 particularly true when one considers the indefinite nature of the funding. The Guam Legislature
4 could simply abolish the Reserve Fund and cut short all settlement payments⁸. In contrast to the
5 years at the end of the queue, class year 1998 prefers the structured payout since it reduces the
6 number of participants in the initial payout.
7

8 The settlement creates an unnecessary antagonism among the years. Each year wants to
9 be paid first in order to lessen injury from loss of interest. Because of this, the Court cannot find
10 that “the questions of law or fact common to the members of the class predominate over any
11 questions affecting only individual members.” While it is true that each class year has suffered
12 from non-payment of the EITC, this “overarching” question does not predominate. In *Amchem*
13 *Products, Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231 (1997), the Supreme Court explored the
14 predominance question in the context of mass tort asbestos litigation. In that case the Court
15 noted that though all members suffered from exposure to asbestos, that fact did not predominate
16 over the individual member’s desires as to compensation. Some class members wanted
17 immediate compensation as they were currently suffering an illness, other members were not
18 sick but might later develop an illness. These two sub-groups had different interests; one wanted
19 immediate compensation, the other delayed compensation so that their might be funds available
20 to help them through a future illness. “Given the greater number of questions peculiar to the
21 several categories of class members, and to individuals within each category, and the
22 significance of those uncommon questions, any overarching dispute about the health
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29 ⁸ This scenario is not farfetched; this court has noted that Guam’s decision to stop paying the EITC was “more
30 attributable to the shortfall in the public coffers than one in legal reasoning.” See *Order, 15 June 2006, Simpao et al*
v. Government of Guam, CV 04-00049, p.7 (J. Martinez).

1 consequences of asbestos exposure cannot satisfy the Rule 23(b)(3) predominance standard.”
2 *Amchem* at 624. As in *Amchem*, *Santos-Torres* members have all suffered common injury but
3 this does not predominate over each years need to lessen its injury from loss of accumulated
4 interest. All want to be paid first, and all are pitted one against the other for position because of
5 the settlement.
6

7 II. Class Representative Does Not Fairly and Adequately Represent the Interests of the Class
8

9 Rule 23 (a)(4) requires that “the representative parties [must] fairly and adequately
10 protect the interests of the class.” “Adequate representation ‘depends on the qualifications of
11 counsel for the representatives, an absence of antagonism, a sharing of interests between
12 representatives and absentees, and the unlikelihood that the suit is collusive” *Local Joint*
13 *Executive Bd. of Culinary/Bartender Trust Fund v. Las Vegas*, 244 F.3d 1152, 1162 (9th Cir.
14 2001)(internal citations omitted.)
15

16 Thus, in order to adequately represent the class and make a class action sustainable, an
17 attorney appointed to serve as class counsel must be able to fairly and adequately represent the
18 class. *Fed. R. Civ. P.23 (g)(1)(b)*. The Manual for Complex Litigation sets forth the following
19 criteria for appointment of class counsel.
20

21 In every case, the judge must inquire into the work counsel has
22 done in investigating and identifying the particular case; counsel's
23 experience in handling class actions, other complex litigation, and
24 claims of the type asserted in the action; counsel's knowledge of
25 the applicable law; the resources counsel will commit to
26 representing the class; and any other factors that bear on the
27 attorney's ability to represent the class fairly and adequately.

28 David F. Herr, *Manual for Complex Litigation* (4th ed. 2004) (hereinafter “Manual”) § 21.271 at
29 345. The attorney seeking the appointment has the burden to prove he is both qualified and
30 otherwise adequate.

1 The adequacy of counsel should be assessed at all stages of litigation. *See Key v Gillette*,
2 782 F.2d 5, 7 (1986). Counsel originally thought to be suitable may prove themselves unsuitable
3 through their conduct. *Id.* (approving decertification of a class because previously accepted
4 counsel's lackluster performance during trial reflected an inability to adequately protect the
5 interests of the class).

7 Mistakes made by counsel in the early rounds of litigation can be indicative of
8 inadequacy. *Armstrong v. Chicago Park District*, 117 F.R.D. 623, 633 (N.D. Ill. 1987). Conduct
9 during settlement negotiations can be particularly relevant to an adequacy assessment. *See In re*
10 *General Motors Corp. Engine Interchange Litigation*, 594 f.2d 1106, 1121-1130 (7th Cir.1979).
11 In *General Motors*, the court identified several factors that may suggest representation of the
12 class during settlement negotiations is less than vigorous. They include: (1) Settlement reached
13 relatively early in the course of the action; (2) incomplete discovery; (3) counsel ill-informed
14 about the full value of the claims they were surrendering; (4) abandonment of some claims; and,
15 (5) failure to include all class counsel in negotiations. *Id.*

17 At issue here is a tax refund case. There are few cases more procedurally difficult than a
18 tax refund class action as both tax cases and class actions present significant procedural hurdles.
19 These threshold requirements must be met to ensure the outcome is just and the effort put in to
20 resolve the matter is not wasted by subsequent reversal. Where government misconduct and
21 public funds are at issue, rigorous scrutiny is required. Phillips' record in this case cannot
22 withstand such scrutiny.

24 The complaint filed in *Santos I* demonstrates Phillips did not adequately identify or
25 investigate the potential claims in this action or develop an understanding of the applicable law.
26 *Fed. R. Civ. P. § 23(g)(1)(c)(i)*. While he claims to have prepared for years to bring an EITC
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1 action against the government, the action he actually filed evidences little attention to its
2 procedural complexities. His complaint shows no attempt to meet the statutory requirements of a
3 tax refund action as Santos never alleged she had filed tax returns for the relevant years or had
4 otherwise met the exhaustion requirements of 26 U.S.C. § 7422. He also failed to define the class
5 such that it could be alleged its members satisfied exhaustion requirements on a class-wide basis.
6 Thus, the original *Santos* Petition would not have survived a motion to dismiss. *Cf., Order, J.*
7 *Lew, Mar. 17, 2005, Simpao v. Guam, CV04-00049, Docket No. 53 (denying Governor's motion*
8 *to dismiss because Plaintiffs pled exhaustion).*

11 In addition, while claiming to represent all disadvantaged people of Guam, Phillips
12 brought this important case with a class representative who apparently cannot represent all tax
13 years at issue. As a result, when Phillips filed the complaint, he abandoned Guam citizens with
14 EITC claims for tax years 1995-1997. Although tax year 1996 (but not 1995 or 1997) was
15 eventually covered in the *Santos I* settlement (apparently at the request of government), there is
16 no evidence Phillips sought relief on their behalf. "Counsel's choice of an incorrect opening date
17 for a class period can seriously prejudice class members and has been considered by other courts
18 as a factor justifying denial of class certification." *Armstrong v. Chicago Park Dist.*, 117 F.R.D.
19 623, 633 (N.D. Ill. 1987).

23 Finally, contrary to express statutory requirements, Phillips named the wrong party as a
24 defendant. Phillips named the Governor, the Attorney General, and two administrative
25 department heads, when the law expressly requires only "the government" be named as a
26 defendant in tax refund actions. 48 U.S.C. §§ 1421i(a) & (h)(2) (Organic Act of Guam). Under
27 normal circumstances, this would be considered a hyper-technical criticism, but in this case, the
28 error arguably contributed to the resulting battle between the Governor and the Attorney General.
29
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1 More troubling than the deficiencies in his complaint is the poor judgment and disregard
2 for class action settlement procedure Phillips exhibited in securing court approval for *Santos I.*
3 Courts have long recognized these procedures are important.

4
5 *a. Phillips' Conduct Regarding Fee Negotiations Were Improper.*

6 First, and most egregious, the available record indicates Phillips negotiated his fee at the
7 same time he negotiated the settlement for the class. The agreement executed by all parties on
8 June 14, 2004 and filed with the Court for preliminary approval contained a provision that
9 Phillips would receive 10% of the settlement fund. *CV04-00006, Docket No. 14; see Fisher*
10 *Decl. at Exhibit C.* On June 17, 2004, apparently during the parties' meeting with the Magistrate
11 Judge, that provision was crossed over and replaced with the more proper wording that the Court
12 would determine appropriate fees. *Id.* Its presence in the original document and the timing of its
13 correction strongly suggest a prior agreement regarding fees had been reached by the parties.

14
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16 The Ninth Circuit has explained the problem with simultaneously negotiating attorney's
17 fees with settlement terms.

18
19 We cannot indiscriminately assume, without more, that the amount
20 of fees have no influence on the ultimate settlement obtained for
21 the class when, along with the substantive remedy issues, it is an
active element of negotiation.

22 *Mendoza v. Tucson School Dist. No. 1*, 623 F.2d 1338, 1352 (9th Cir. 1980), citing *Prandini v.*
23 *National Tea Co.*, 557 F.2d 1015, 1021 (3d Cir. 1977). *See also* H. Newberg & A. Conte,
24 *Newberg on Class Actions* (4th ed. 2002) Newburg, § 15.31 at 108 (noting that where counsel
25 has engaged in such conduct "the court would have the almost impossible task of deciding
26 whether the class settlement was fair and adequate or whether it should have been increased by
27 some or all of the funds allocated by the attorneys for fees."); *Knisley v. Network Associates, Inc.*
28 *312 F.3d 1123, 1125 (9th Cir. 2002.)* ("One risk of class action settlements is that class counsel
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1 may collude with the defendants, tacitly reducing the overall settlement in return for a higher
2 attorney's fee.").

3 The *Mendoza* Court specifically noted that even if actual impropriety is not found, the
4 Court has a "duty to see to it that the administration of justice has the appearance of propriety as
5 well as being so in fact." *Mendoza*, 623 F.2d at 1353, n.20. Thus the Court has directed:

7 The presence of simultaneously negotiated attorneys' fees should
8 cause the court to examine with special scrutiny the benefits
9 negotiated for the class. It would rarely be an abuse of discretion
10 for a trial court to reject a settlement proposal where such
combined negotiation took place.

11 *Id.* at 1353. Phillips' failure to secure a settlement for the class before he worried about his fees
12 demonstrates he is inadequate counsel for this class.

13 Further, Phillips has never provided the Court with any of the indicia of reliability that
14 might overcome the presumption of impropriety caused by his conduct. As the Attorney General
15 informed the Governor, "there is no written documentation regarding the history of the
16 negotiations leading up to [Santos I]." *Gov's Opp. To Settlement*, CV04-00006, Docket No. 102,
17 at p. 4. In addition, Phillips never provided the Court the information it needs to "examine with
18 special scrutiny the benefits negotiated for the class" in any of the three settlements he has
19 presented to this Court. The Manual expressly notes:

22 Where settlement is proposed early in the litigation . . . consider
23 asking counsel to provide complete and detailed information about
24 the factors that indicate the value of the settlement. Such factors
25 include:-likelihood of success at trial;-likelihood of class
26 certification;-status of competing or overlapping actions;-claimants
27 damages and value of claims;-total present value of monetary and
28 non-monetary terms;-attorneys fees;-cost of litigation; and -
defendant's ability to pay.

29 *Manual* § 21.631 at 413.

1 Phillips claims he conducted research on these claims and the government's ability to
2 pay the EIC but he has yet to even identify for the Court the full value of the class' EITC claims
3 inclusive of interest. He has presented no analysis of what the government's actual outlay would
4 be after the government accounts for all the offsets it has preserved in the settlement. He has
5 simply accepted the government's representation that this is all it will pay.
6

7 Phillips' failure to provide any specific evidence as to the factors related to the
8 reasonableness and adequacy of *Santos I, II, and Santos-Torres*, especially in light of his
9 inappropriate conduct has produced a suspect settlement. See *In re General Motors*, 594 F.2d at
10 128 (noting vigorous representation is absent where counsel is ill informed about the value of the
11 claims he is surrendering). In providing no such evidence he has demonstrated his inadequacy to
12 serve as lead counsel.
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15 Other conduct regarding the fee award in *Santos I* further demonstrates Phillips is
16 indifferent to or completely unaware of the duties he owes the class. He inappropriately sought
17 and obtained approval of his proposed attorney fees without ever submitting a proper motion as
18 required by Fed.R.Civ.P. 23(h)(1). Thus, the class would have been deprived of any ability to
19 scrutinize the reasonableness of the fee. Phillips also caused the first notice of the proposed
20 settlement to include a statement that his six million dollar fee award had already been approved
21 by the Court. Even after he acknowledged the Court would have to assess the reasonableness of
22 fees at a final fairness hearing, he still sought to give his fee request an imprimatur of
23 reasonableness by proposing a notice that said the Court had "preliminarily" approved his fee.
24 Phillips' complete failure to follow procedures designed to mitigate the appearance of and actual
25 potential for abuse in the class action context (much less one involving precious government
26 funds) makes him unsuitable to serve as class counsel.
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1 b. *Conduct unrelated to fees also indicates Phillips is not likely to adequately*
2 *protect the interest of this class.*

3 In the *Santos I* notice, Phillips did not even identify himself and instruct class members to
4 contact him with their questions regarding the proposed settlement. Instead he delegated to the
5 defendant his duty to inform and advise the class he claims to represent. *See Manual at § 21.641*
6 *at 416* (“Counsel must be available to answer questions from class members in the interval
7 between notice of the settlement and settlement hearing.”)

8 Further, Phillips' acquiescence to published notice versus individual notice belies any
9 vigor exercised on behalf of the class. Because class members will be bound by the judgment in
10 a class action, notice of impending settlement is crucial. The Supreme Court held that,
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12 in any class action maintained under subdivision (b)(3), each class
13 member shall be advised that he has the right to exclude himself
14 from the action on request or to enter an appearance through
15 counsel, and further that the judgment, whether favorable or not,
16 will bind all class members not requesting exclusion. To this end,
17 the court is required to direct to class members ‘the best notice
18 practicable under the circumstances including individual notice to
19 all members who can be identified through reasonable effort. We
20 think the import of this language is unmistakable. Individual notice
21 must be sent to all class members whose names and addresses may
22 be ascertained through reasonable effort.

23 *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 173, 94 S. Ct. 2140, 2150 (1974). Phillips
24 apparently does not understand that class counsel, not defendant, has and will continue to have a
25 duty to ensure adequate informative interaction with the class throughout the settlement approval
26 process and through claims administration as well.

27 Phillips also failed to secure adequate treatment for tax year 2000 claims in the current
28 proposed settlement. As noted in the *Simpao* Plaintiff's opposition to this settlement, *Santos-*
29 *Torres* treats year 2000 claims as if they are potentially time-barred when they are not. Other
30 courts have held mishandling of a limitations period reflects on the counsel's competence and

1 diligence in pursuing class claims. *Armstrong v. Chicago Park Dist.*, 117 F.R.D. 623, 633 (N.D.
2 Ill. 1987). This Court should hold the same.

3 Phillips' failure to include all class counsel in settlement negotiations also demonstrates
4 his inadequacy. *See Manual at §21.271 at 345*. The two class actions filed after Santos,
5 identified ways to strengthen the class' claims, yet Phillips refused to work cooperatively with
6 other class counsel, specifically rejecting the Simpao counsel's request to participate in the
7 negotiations that led to *Santos II*. As courts note:

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10 . . . settlement negotiations with less than all class counsel
11 weakens the class' tactical position even if the attorney who enters
12 into the negotiations attempts to represent the class' interest
vigorously.

13 *In re General Motors*, 594 F.2d at 1125. Phillips repeated the mistake even after this Court
14 made known its desire for a global settlement.

15
16 In addition to not working with other class counsel, Philips also did nothing to protect the
17 class' claims from potentially adverse, if not fatal, rulings in the competing class actions. He
18 never moved to stay the competing actions in favor of *Santos* nor did he move to consolidate the
19 cases and seek to have himself appointed lead counsel. The latter failure is especially glaring
20 given he had the advantage of having been first to file and had what he claimed was a fair and
21 reasonable settlement. Instead, Phillips sat idly by while the government filed a motion to
22 dismiss in *Simpao*. Notably, if the government had succeeded in dismissing *Simpao* based on
23 lack of jurisdiction, *Santos I* would have been invalidated as well. The Court would have had no
24 jurisdiction to approve the settlement. *Cf.*, *Order, J. Lew, Mar. 17, 2005, Simpao v. Guam*,
25 *CV04-00049, Docket No. 53* (denying Governor's motion to dismiss for lack of jurisdiction); *see*
26 *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 at 701,
27 *102 S. Ct. 2099 (1982)* (parties may not confer subject matter jurisdiction upon court via
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1 settlement agreement where it does not otherwise exist). Phillips also took no action when
2 *Simpao* moved for summary judgment even though his client's claims would have been damaged
3 if *Simpao*'s motion had failed. Notably, Phillips and respondents now expressly attempt to rely
4 on holdings obtained in *Simpao* to claim this Court has jurisdiction over their flawed settlements.
5

6 *c. The Apparent Political Manipulation Associated with the Santos I Settlement*
7 *was not in the Best Interest of the Class*

8 Based on the circumstances of the *Santos I* settlement, the Court can reasonably infer,
9 and must at least consider the possibility, that Phillips used this class action as a political tool,
10 putting the interest of certain political office holders ahead of the interest of the class. It does not
11 take the benefit of 20/20 hindsight to know that entering a stipulated settlement creating a
12 \$60 million dollar liability for a cash-poor government without the knowledge or consent of the
13 Governor is fraught with peril. Yet Phillips, along with the Lieutenant Governor and the
14 Attorney General, hastily entered into and publicly announced a settlement in this matter while
15 the Governor was off-island. Instead of using the strength of the EITC claims to ensure a secure
16 settlement, he chose to negotiate with political opponents of the Governor, one of which was his
17 client. Their collective actions placed the Governor in an untenable position politically. He
18 either had to oppose the settlement publicly or allow his political opponents to (in his view)
19 hamstring him financially. That tactic directly resulted in the political battle between the
20 Governor and the Attorney General that has delayed relief for the class for over two years. It is
21 difficult to believe Phillips was so insensitive to these political considerations when, by his own
22 admission, he was thrice elected chair of the local Democratic party and is actively involved in
23 Guam politics. See *Amended Motion Of Petitioner Julie Babauta Santos For Appointment Of*
24 *Lead Class Counsel, CV04-00006, Docket No. 348*. Even if Phillips believed he had a better
25 chance of securing a settlement from these political players than the Governor, the attempt to
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1 pull an end run around the Governor at best exhibited a profound lack of judgment. Had Phillips
2 included the Governor from the outset, the EITC class might well be receiving their refunds
3 today.

4
5 Phillips' long series of procedural irregularities demonstrate he cannot be relied on to
6 adequately represent the class. *See Wrighten v. Metropolitan Hospitals, Inc.*, 726 F.2d 1346,
7 1352 (9th Cir. 1984) (a trial court rightly considers the competency of counsel when determining
8 class certification) and *Fendler v. Westgate-California Corp.*, 527 F.2d 1168, 1170 (9th Cir.
9 1975) (one of the criteria for adequacy of representation would appear to be the zeal and
10 competence of the counsel and party who wish to prosecute the action.).

11
12 *d. Phillips' Prior Representation Fails To Support His Ability To Adequately*
13 *Represent The Class*

14 Mr. Phillips has cited his involvement in *Rios v. Ada et al.*, Superior Court of Guam,
15 SP0206-93, in support of his class action experience. *Rios* is a case which has been slowly
16 litigated since 1993. Mr. Phillips seeks to recover a judgment for unpaid cost of living
17 adjustments to retirees from the government of Guam, in an amount seeking over a hundred
18 million dollars. Mr. Phillips let this class action languish for over 10 years without the class
19 receiving any monetary relief from the government defendant, even failing to do as little as
20 change his individually named defendant Governors when they left office. Recently, Mr.
21 Phillips has seemingly resurrected this case from inactivity and is pursuing over a hundred
22 million dollars from the same government in the EITC suit, which in both cases has claimed that
23 either judgment rendered against the government would have catastrophic effects because the
24 government claims it lacks the ability to pay either, a fact invariably conflicting with and
25 impacting upon Mr. Phillips' resolve in his settlement negotiations over the amount of EITC
26 refunds.
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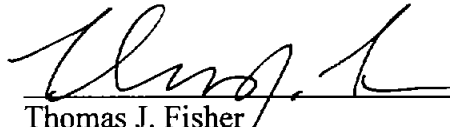
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CONCLUSION

This Court should not grant final class certification. The class, due entirely to an artificial and imposed structure for settlement is embroiled in antagonism. This is related to, and flows from class representative's failure to adequately protect class interests.

Finally, the pattern of error evidenced through *Santos I, II* and *Santos-Torres* illustrate that Santos is not suited to represent the class; she has had a sufficient number of "at bats" and struck out each time. Simpao and Cruz respectfully request that counsel for Simpao be appointed lead counsel.

Dated this 22nd day of June, 2007



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